In the High Court of Judicature for Rajasthan
Jaipur Bench

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Arbitration Application No.19/2007

M/s Pionner Fabricators (P) Ltd

Versus Indian Oil Corpn. Ltd.

Date of Order ::: 05/10/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. P.Surana, for Mr. Paras Kuhad for applicant
Mr. S. Kasliwal, for respondent

Instant application U/s 11(5) of Arbitration & Reconciliation Act, 1996 ("**the Act**") has been filed seeking appointment of an independent Arbitrator.

Applicant is private limited Co., having its Office at B-2, Saraswati Industrial Area, Meerut-Delhi Road Partapur, carrying on business of constructions works & maintenance on contract basis. Applicant Company entered into an agreement with Indian Oil Corporation (respondent No.1) vide work contract order PG/ ENG/2571/dt.02/08/98 for designing/construction of complete industrial sheds with space frames structure for LPG bottling plant at Jaipur.

The case of applicant is that under terms of agreement, despite applicant having

complied with part of its obligation, respondent Corporation failed to carry out its obligation and thus committed defaults in making timely periodical payments to applicant Company and thus the respondent Corporation has contravened its own policy decision dt.09/09/1998 to release the running account payments within seven days from preparation of the bill and committed breach of contract – in consequence whereof, since there was Cl.18 in the agreement for appointment of arbitrator, notice was sent by applicant Company as allegedly on 16/01/02 requesting respondent Corporation to constitute an arbitral Tribunal. It is also case of applicant that since respondent Corporation failed to appoint Arbitrator within thirty days of receipt of aforesaid notice, application was filed U/s 11 of the Act with the request to Hon'ble the Chief Justice for appointment of arbitrator. This application was registered as Arb. Appl.No.37/2003 wherein notice was issued by this Court vide order dt.06/11/03 and the respondent Corporation filed reply, to which rejoinder was also filed by applicant Company.

Any how, after so many adjournments – referred to in para-xv of instant application, applicant withdrew Appl. No.37/2003 with a liberty to file fresh one and accordingly the same was dismissed vide order dt.26/05/06. Thereafter instant application has been filed on 28/02/07, on which notice was issued vide order dt.23/03/07. Respondents have filed reply inter-alia alleging that notice/request for making appointment of Arbitrator as made in para-xii of instant application dt.16/01/02 was disputed and specific averment has been made that no such notice/request was ever received in their office and for the first time it came to their notice when they were served with notice issued by this Court in earlier Appl.37/03 and immediately thereafter in terms of Clause 18 of agreement, Arbitrator was appointed vide letter dt.15/05/04 - in pursuance whereof, notices were issued by Arbitrator to applicant Company but they failed to appear before him – in support, respondent Corporation has produced order-sheets dt.26/06/07 & 24/07/07 (Ann.R.1/1 & R.1/2) to show that opportunities were afforded to

applicant Company but failed to appear and submit its claim before Arbitrator for consideration - on failure to submit claim, arbitration proceedings ultimately terminated vide order dt.24/07/07 (Ann.A).

Only objection raised by Counsel for applicant is that despite their request to appoint Arbitrator vide notice dt.16/01/02 since respondents failed to respond the notice, applicant approached this Court by way of Appl. No.37/07 and only upon receipt of notice whereof, appointment of Arbitrator was made by respondent Corporation allegedly vide letter dt. 15/05/04; as such right of appointment stands forfeited since respondents failed to make appointment within thirty days of receipt of notice dt.16/01/02 as prescribed in S.11(5) of the Act, particularly when appointment has been made much after filing of Appl.No.37/03. That apart, as per Cl.18 read with special condition of the agreement, it is Executive Director (NR) who can be sole arbitrator in lieu of Director (Marketing); as such very appointment of Arbitrator in question is in violation of Cl.18

itself.

Counsel for respondent basically submits that under Cl.18 of the agreement, either Director (Marketing) himself or if he fails/is unable to act as Arbitrator, he was made competent to refer to the Arbitrator of some other person designated by Director (Marketing) in his place; accordingly Arbitrator was appointed – copy whereof was sent to the applicant vide letter dt.06/05/04. It has also been submitted that no request of appointment of Arbitrator was ever made to the respondent and notice dt.16/01/02 allegedly sent by applicant was never received in their office and it came to their knowledge only after notice of earlier Appl.No.37/03 was served and without loss of time, appointment was made of Arbitrator for resolving the alleged dispute, if at at all there is; but applicant failed to appear before Arbitrator and other objections raised would certainly be available to be raised before Arbitrator – in absence whereof, no cause of action is sustained as there is no violation of agreement and respondent Corporation has acted

in terms of agreement, itself.

Question to be considered is as to whether there is any violation of mechanism provided under the agreement. Extract of Cl.18 in special condition of agreement relevant for present issue is reproduced ad infra:

> "... and this contract, shall be referred by any aggrieved party to the contract **which term will include the Corporation to Sole Arbitrator of the Director (Marketing) of the Corporation. If such, Director (Marketing) is unable or unwilling to act as the Sole Arbitrator, the matter shall be referred to the Sole Arbitration of some other person designated by such Director (Marketing) in his place, who is willing to act as such Sole Arbitrator.** It will be no objection to any such appointment that the Arbitrator so appointed is a Government servant, on deputation with the Corporation or the employee or the officer of the Corporation or that in the course of his duties as employees or officer of the Corporation he had to deal with the matters to which the contract relates or that he had expressed his views on

or any of the matters in dispute or differences. The Arbitrator to whom the matter is originally referred, whether the Director (Marketing), the employee or officer or Government servant on deputation, as the case may be on his being transferred or vacating his office or being unable to act, for any reason, the Director (Marketing) shall designate any other person to act as arbitrator in accordance with the terms of the contract and such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also the term of this contract that no person other than the Director (Marketing) or the person designated by the Director (Marketing) as aforesaid should act as Arbitrator. The award of the Arbitrator so appointed shall be final, conclusive and binding on all the parties to the contract and provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the Rules made there under and for the time being in force shall apply to the arbitration proceeding under this Clause....”

> Agreement to be subject to the Corporation's General conditions of contract and special condition, if any of the works orders.
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> **(b)** Under the Special conditions of contract :
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> **08 Procedure for Arbitration** : In partial modification to clause 18 of the 'works contract' attached as Annexure at Ann-VIII, Executive Director (NR) shall be the sole Arbitrator in lieu of Director (Marketing)".

It has been clarified by respondent Corporation in its reply that immediately after the agreement was entered into, post of Director (NR) was abolished; as such there is no person designated as Director (NR) in their Corporation Clause (supra) gives discretion to the first respondent, particularly Director (Marketing) to act as Sole Arbitrator or if he is unable or unwilling to act as Arbitrator then he can refer to some other person designated by Director (Mktng). While making appointment of Arbitrator, it is an unilateral act and the consent of applicant in terms of Cl.18 of the agreement is not required to be obtained.

Once request as allegedly made for appointment of Arbitrator by applicant through notice dt.16/01/02 has been disputed by respondent Corporation contending that no such notice was ever received or served upon Corporation; in such circumstances, submission made by Counsel that the respondent Corporation failed to appoint Arbitrator in terms of Cl.18 of agreement within 30 days of their request through notice dt.16/01/02 does not hold good. In instant case, application was earlier filed with respect to same grievance of appointment of Arbitrator and after pleadings were complete, for reasons best known to applicant Company, the same was dismissed as withdrawn with liberty to file fresh vide order dt.26/05/06 and, much before filing instant application or during pendency of earlier Appl. No.37/03, Arbitrator was appointed on 15/05/04 and despite opportunity afforded, applicant-Co., failed to appear before Arbitrator in such circumstances, it cannot be said that there was failure of procedure prescribed under contract/agreement. This Court does not think that respondent, in

appointing the Arbitrator in terms of Cl.18 of agreement, has failed to follow the procedure or acted in contravention of arbitration clause of the agreement. This Court is of the opinion that while filing application U/s 11 of the Act the applicant has no cause of action to sustained the same as there was no failure of agreement or the respondents failed to act in terms of agreement.

Consequently, arbitration application fails and is hereby dismissed. No costs.

(**Ajay Rastogi), J.**

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